UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MALIBU MEDIA, LLC, PATRICK COLLINS, INC., and THIRD DEGREE FILMS Plaintiffs, v. Verizon Online, LLC, Defendant.	Case No.: 6:12-mc-17 Actions Pending in: **Eastern District of Pennsylvania** Case No.: 5:12-cv-03959-JS Case No.: 2:12-cv-05386-CDJ Case No.: 2:12-cv-05385-WY **Middle District of Florida** Case No.: 2:12-cv-00402-UA-SPC Case No.: 2:12-cv-00521-JES-SPC Case No.: 8:12-cv-01668-JDW-TBM Case No.: 2:12-cv-267-UA-AEP Case No.: 2:12-cv-00425-UA-DNF Case No.: 2:12-cv-00444-UA-DNF Case No.: 8:12-cv-01418-SCB-EAJ Case No.: 8:12-cv-01419-EAK-TGW Case No.: 32:8:12-cv-01666-JSM-EAJ Case No.: 31: 8:12-cv-01667-JDW-MAP Case No.: 8:12-cv-01665-VMC-TGW Case No.: 8:12-cv-01764-VMC-TGW Case No.: 8:12-cv-01767-JSM-MAP Case No.: 8:12-cv-01822-JDW-MAP Case No.: 2:12-cv-00444-UA-DNF Case No.: 8:12-cv-01823-JSM-AEP Case No.: 2:12-cv-00522-UA-DNF **Central District of New Jersey** Case No.: 2:12-cv-03906-SRC-CLW Case No.: 2:12-cv-03907-ES-CLW Case No.: 3:12-cv-04695-JAP-DEA Case No.: 2:12-cv-05171-SDW-MCA Case No.: 2:12-cv-05815-FSH-PS Case No.: 3:12-cv-03898-MAS-LHG Case No.: 2:12-cv-03905-SRC-CLW Case No.: 3:12-cv-03900-AET-LHG Case No.: 3:12-cv-05102-JAP-TJB

PLAINTIFFS' MOTION TO ENFORCE SUBPOENAS AND FOR CONTEMPT

Plaintiffs, Patrick Collins, Inc., Malibu Media, LLC, and Third Degree Films, Inc. (collectively, "Plaintiffs"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 45(c)(2)(B)(i) and 45(e), hereby move for the entry of an order enforcing and compelling responses to third party subpoenas served upon Defendant, Verizon Online LLC ("Verizon"), and holding Verizon in contempt for failing to obey the subpoenas, and state:

I. INTRODUCTION

Plaintiffs seek Verizon's immediate compliance with Court-authorized subpoenas requiring it to produce identifying information for certain of its customers currently identified only through their Internet Protocol ("IP") addresses and Internet Service Providers ("ISPs") as having infringed Plaintiffs' copyrights. Plaintiffs intend to use the subpoenaed information to name and serve these persons as defendants in copyright infringement cases. Without the identifying information, Plaintiffs cannot name and serve these persons, and therefore have no remedy for the infringement they have suffered and continue to suffer.

Verizon objects to the subpoenas on various grounds, all of which lack merit. Accordingly, Plaintiffs respectfully request that the Court overrule each of Verizon's objections, compel immediate compliance with Plaintiffs' subpoenas and hold Verizon in contempt for failing to obey the subpoenas.

II. BACKGROUND

1. Plaintiffs have filed the following complaints (the "Complaints"), copies of which are attached hereto as Composite Exhibits "A1 – A3," against unnamed and yet-to-be-identified "John Doe" defendants (the "Doe Defendants"):

Eastern District of Pennsylvania (Exhibit A1)

Malibu Media, LLC v. JD 35	Case No.: 5:12-cv-03959-JS
Third Degree Films v. JD 1-53	Case No.: 2:12-cv-05386-CDJ
Patrick Collins, Inc. v. JD 32	Case No.: 2:12-cv-05385-WY

Middle District of Florida (Exhibit A2)

Patrick Collins, Inc. v. JD 31	Case No.: 2:12-cv-00402-UA-SPC
Patrick Collins v. JD 1-43	Case No.: 2:12-cv-00521-JES-SPC
Patrick Collins, Inc. v. JD 17	Case No.: 8:12-cv-01668-JDW-TBM
Malibu Media, LLC. v. JD 67	Case No.: 2:12-CV-267- UA-AEP
Malibu Media, LLC. v. JD 1-24	Case No.: 2:12-cv-00425-UA-DNF
Malibu Media, LLC. v. JD 1-18	Case No.: 2:12-cv-00444-UA-DNF
Malibu Media, LLC. v. JD 13	Case No.: 8:12-cv-01418-SCB-EAJ
Malibu Media, LLC. v. JD 18	Case No.: 8:12-cv-01419-EAK-TGW

Middle District of Florida (Exhibit A3)

Malibu Media, LLC v. JD 19	Case No.: 32: 8:12-cv-01666-JSM-EAJ
Malibu Media, LLC v. JD 28	Case No.: 8:12-cv-01667-JDW-MAP
Malibu Media, LLC v. JD 28	Case No.: 8:12-cv-01665-VMC-TGW
Malibu Media, LLC. v. JD 1-27	Case No.: 8:12-cv-01764-VMC-TGW
Malibu Media, LLC. v. JD 1-25	Case No.: 8:12-cv-01767-JSM-MAP
Malibu Media, LLC. v. JD 1-8	Case No.: 8:12-cv-01822-JDW-MAP
Malibu Media, LLC. v. JD 1-18	Case No.: 2:12-cv-00444-UA-DNF
Malibu Media, LLC. v. JD 1-20	Case No.: 8:12-cv-01823-JSM-AEP
Third Degree Films v. JD 1-70	Case No.: 2:12-cv-00522-UA-DNF

Central District of New Jersey (Exhibit A4)

Patrick Collins, Inc., v. JD 47	Case No.: 2:12-cv-03906-SRC-CLW
Patrick Collins, Inc. v. JD 44	Case No: 2:12-cv-03907-ES-CLW
Patrick Collins, Inc. v. JD 41	Case No.: 3:12-cv-04695-JAP-DEA
Patrick Collins, Inc. v. JD 17	Case No.: 2:12-cv-05171-SDW-MCA
Patrick Collins v. JD 1-50	Case No.: 2:12-cv-05815-FSH-PS
Malibu Media, LLC v. JD 22	Case No.: 3:12-cv-03898-MAS-LHG
Malibu Media, LLC v. JD 46	Case No.: 2:12-cv-03905-SRC-CLW
Malibu Media, LLC v. JD 62	Case No.: 3:12-cv-03900-AET-LHG
Malibu Media, LLC. v. JD 12	Case No.: 3:12-cv-05102-JAP-TJB

2. The Doe Defendants are currently identified in the Complaints solely by their IP addresses and ISPs.

3. In each of the Complaints, Plaintiffs assert that the Doe Defendants directly and contributorily infringed Plaintiffs' copyrights through the use of their internet connection and the BitTorrent protocol.

4. In each of the cases, Plaintiffs filed Motions and Memoranda of Law in Support of Leave to Serve Third Party Subpoenas Prior to a Rule 26(f) Conference upon the Doe Defendants' ISPs.

5. The Courts granted Plaintiffs' Motions in these cases, and required the Doe Defendants' ISPs to provide Plaintiffs with identifying information, including names, addresses, telephone numbers, and e-mail addresses, of the Doe Defendants to whom the ISPs had assigned IP addresses. *See* Orders Granting Plaintiffs' Motions for Leave to Serve Third Party Subpoenas Prior to a Rule 26(f) Conference, attached hereto as Composite Exhibit "B."

6. Pursuant to the Court's Orders, Plaintiffs served subpoenas on Verizon. Copies of the subpoenas are attached hereto as Composite Exhibits "C1-C3."

7. Rather than comply, Verizon has objected to the subpoenas based on numerous inappropriate and baseless grounds. Copies of Verizon's objections (the "Objections") are attached hereto as Composite Exhibit "D."[1]

8. For the reasons set forth below, Plaintiffs respectfully request the Court to overrule each of Verizon's objections, compel immediate compliance with Plaintiffs' subpoenas and hold Verizon in contempt for failing to obey the subpoenas.

[1] Plaintiffs reserve their right to add additional objections by Verizon for consideration under this motion upon proper notice to the Court and Verizon, and as such objections come to Plaintiffs' attention in cases they have filed or will file.

III. MEMORANDUM OF LAW

A. Verizon's Objection Based on Misjoinder Fails on Multiple Grounds

Verizon's first objects on the grounds that the subpoenas purportedly constitute an "abuse of the discovery process" because the Doe Defendants have not been "properly joined" in the underlying actions. Objections, ¶ 1. Verizon's objection fails for three reasons.

1. Verizon lacks standing to object based on misjoinder.

First, Verizon lacks standing to raise this objection because it is not a party. *See AF Holdings LLC v. Does 1-1,058*, 2012 WL 3204917, at *8 (D.D.C. 2012) (holding that if misjoinder "did exist in the underlying action, [it] must be raised, and may be waived, by named defendants.")

2. Misjoinder is not a basis to object to a third-party subpoena.

Second, even if Verizon had standing to raise this objection, a "discussion of joinder is not germane to [objections to subpoenas such as] motions to quash before the Court, as the remedy for improper joinder is severance… [.]" *Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp.2d 556, 568 (S.D.N.Y. 2004). "[M]isjoinder [is] not delineated under Federal Rule of Civil Procedure 45 as [a basis] to quash a subpoena issued to a third-party." *AF Holdings*, 2012 WL 3204917, at *8. And, even if joinder were a basis to quash a subpoena, severance would not be proper at this stage of the underlying litigation, as the actions are "in [their] infancy, and each defendant will have ample time to challenge his inclusion in the litigation." *John Wiley & Sons, Inc. v. Does Nos. 1-27*, 2012 WL 364048, at *2 (S.D.N.Y. 2012), *and cases cited therein* (Emphasis added.); *see also AF Holdings*, 2012 WL 3204917, at *8 (holding that consideration of joinder was not appropriate at identical procedural juncture).

3. Joinder is appropriate in the underlying cases.

Third, even if Verizon could object on the basis of misjoinder, and it cannot, joinder is proper in the underlying cases. The record in the underlying cases provides *prima facie* evidence that the alleged BitTorrent activity regarding the Defendants is part of the same series of transactions and occurrences. *See, e.g., West Coast Productions, Inc. v. Does 1-351*, 2012 WL 2577551, at *2 (S.D. Tex. July 3, 2012) (citations omitted). Further, Plaintiffs have pled that the Doe Defendants in each case are jointly and severally liable for each other's infringement. Complaints, ¶ 10.

In their Complaints, for example, Plaintiffs allege that "each [Doe] Defendant peer member participated in the same [BitTorrent] swarm and directly interacted and communicated with other members of that swarm through digital handshakes, the passing along of computer instructions, uploading and downloading, and by other types of transmissions." Complaints (Exhibits A1-A4), ¶ 33. This allegation is supported by a declaration attached to Plaintiffs' Memoranda of Law in Support of Leave to Serve Third Party Subpoenas Prior to a Rule 26(f) Conference, in which the Plaintiffs' forensic investigator, Tobias Feiser, declares that "the computers using the IP addresses [corresponding to the Doe Defendants] connected to the investigative server in order to transmit a full copy, or a portion thereof, of a digital media file identified by [a particular] hash value," and that the "peers using the [identified IP addresses] were all part of a 'swarm' of peers that were reproducing, distributing, displaying or performing [Plaintiffs'] copyrighted work…[.]" *See, e.g.*, Declaration of Tobias Feiser in E.D. Pa. Case No. 5:12-cv-03959-JS [CM/ECF 4], attached hereto as Exhibit "E," ¶¶ 18, 20.

For purposes of joinder, Plaintiffs have also established that there are various common questions of law and fact that pertain to all Doe Defendants. For instance, the Court will need to determine: (a) "whether copying has occurred within the meaning of the Copyright Act," *West*

Coast Productions, 2012 WL 2577551, at *3; (b) whether entering and/or remaining in a torrent swarm constitutes willful infringement […]," *id*.; (c) "whether and to what extent Plaintiff has been damaged by one or more Defendants' conduct," *id*.; and (d) whether "each of the Defendants is jointly and severally liable for the infringing activities of each of the other Defendants," Complaints, ¶ 10.

Plaintiffs, therefore, now merely seek "identifying information in order to investigate the facts concerning, to formally name, and to serve a subset of currently referenced Doe Defendants if in fact the individuals have a provable connection to the swarm identified in this suit." *West Coast Productions*, 2012 WL 2577551, at *3. It is most efficient at this phase for the Court and Plaintiffs "to maintain a single case with a large number of Defendants to be further investigated for their putative connection to the swarm at issue, rather than hundreds of separate lawsuits." *Id*., *citing Call of the Wild Movie, LLC v. Does 1–1062*, 770 F.Supp.2d 332, 344 (D.D.C. Mar. 22, 2011). Verizon's joinder objection is thus unavailing, and should be overruled. *Id*.

B. <u>Verizon's Objection Based on the Timing of Access to Plaintiffs' Work Misunderstands the Nature of BitTorrent</u>

Verizon's second objection is that Complaints' allegations supposedly "refute" the allegation that the subscribers were acting "in concert, given the time period during which [Plaintiffs'] digital content was allegedly accessed." Objections, ¶ 2. Verizon's objection fails because, as argued above, Verizon lacks standing to raise objections based on misjoinder, which in any event have no merit in this case.

Further, even if Verizon could raise the issue, an objection based on the time period during which Plaintiffs' work was accessed has no merit given the way BitTorrent works. The nature of the BitTorrent protocol provides for continuous seeding and distributing of a digital media file long after it has downloaded. Without stopping the program by physically un-

checking the automatic seeding, an alleged infringer likely will seed and distribute a file for an extended period of time. Even after an infringer has completed a download, he or she may distribute the file for weeks after having received the download. As explained in *Patrick Collins, Inc. v. John Does 1-21*, 2012 WL 1190840 (E.D. Mich. Apr. 5, 2012):

> [I]t is not that an infringer would wait six weeks to receive the Movie, it is that the infringer receives the Movie in a few hours and then leaves his or her computer on with the Client Program uploading the Movie to other peers for six weeks. Because the Client Program's default setting (unless disabled) is to begin uploading a piece as soon as it is received and verified against the expected Hash, it is not difficult to believe that a Defendant who downloaded the Movie on day one, would have uploaded the Movie to another Defendant or peer six weeks later. This consideration, however, is irrelevant since concerted action is not required for joinder.

Id. at *168 (Emphasis added.) Here, Plaintiffs' investigator received a piece of the digital media file from the Doe Defendants when they were allegedly distributing it to others. *See* Complaints, ¶ 40.

"While the period at issue may…appear protracted by ordinary standards, the doctrine of joinder must be able to adapt to the technologies of our time." *Malibu Media, LLC v. John Does 1-5*, 2012 WL 3641291 (S.D.N.Y. Aug. 24, 2012). Time constraints should not impact that the infringements occurred through a series of transactions. The law of joinder "does not have as a precondition that there be temporal distance or temporal overlap; it is enough that the alleged BitTorrent infringers participated in the same series of uploads and downloads in the same swarm." *Patrick Collins*, 2012 WL 1190840, at *8. Verizon's objection based on misjoinder should thus be overruled.

C. Verizon's Objection Based on Personal Jurisdiction Fails on Multiple Grounds

Verizon's third objection is that Plaintiffs have made "no attempt" to make a *prima facie* showing that personal jurisdiction exists over the Doe Defendants. Objections, ¶ 3. Verizon's objection fails clearly on five separate grounds.

1. Plaintiffs have made a *prima facie* showing of personal jurisdiction in their Complaints.

First, and contrary to Verizon's objection, Plaintiffs have clearly made a *prima facie* showing of personal jurisdiction in their complaints. Specifically, Plaintiffs have proffered in their jurisdictional allegations in the underlying cases that "each of the [Doe] Defendants' acts of copyright infringement occurred using an Internet Protocol address ("IP address") traced to a physical address located within [the district of filing], and therefore this Court has personal jurisdiction over each Defendant because each Defendant committed the tortious conduct alleged in this Complaint in the [state of filing], and (a) each Defendant resides in the [state of filing], and/or (b) each Defendant has engaged in continuous and systematic business activity, or has contracted anywhere to supply goods or services in the [state of filing]." Complaints, ¶ 8 and Exhibits A1-A4.

Plaintiffs further allege that their forensic investigators determined that "each of the [Doe] Defendant's computers used their IP addresses to connect to the investigative server from a computer in [the district of filing] in order to transmit a full copy, or a portion thereof, of a digital media file identified by the Unique Hash Number." *Id.*, ¶ 40 and Exhibits A1-A4.

At this stage in the underlying cases, Plaintiffs, as the parties seeking to invoke the courts' jurisdiction, "need only present facts sufficient to constitute a *prima facie* case of personal jurisdiction." *Bullion v. Gillespie*, 895 F.2d 213, 216–17 (5th Cir. 1990); *see also Ham v. La Cienega Music Co.*, 4 F.3d 413, 415 (5th Cir. 1993) ("Plaintiffs typically carry the burden of proof on personal jurisdiction by making a *prima facie* showing. The district court usually

resolves the jurisdictional issue without conducting a hearing."); *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 316 (3d Cir. 2007) (holding that if no evidentiary hearing has been held, a plaintiff "need only establish a *prima facie* case of personal jurisdiction."); *accord Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988).

When ascertaining whether a court has personal jurisdiction, "uncontroverted allegations in the [Plaintiffs'] complaint must be taken as true…[.]" *Bullion*, 895 F.2d at 217; *accord Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004); *Morris*, 843 F.2d at 492. Here, and again, no evidence exists to contradict Plaintiffs' jurisdictional allegations because there are no named defendants to challenge same.

2. Verizon lacks standing to object based on personal jurisdiction.

Second, Verizon lacks standing to raise this objection because it is not a party. In cases involving Doe Defendants, there are initially "no named defendants and, consequently, no person with standing to challenge personal jurisdiction before the Court." *AF Holdings LLC v. Does 1-1,058*, 2012 WL 3204917, at *15 (D.D.C. 2012).

3. Personal jurisdiction is not a basis to object to a third-party subpoena.

Third, a "lack of personal jurisdiction… [is] not delineated under Federal Rule of Civil Procedure 45 as [a basis] to quash a subpoena issued to a third-party." *AF Holdings, 2012 WL 3204917*, at *8. Indeed, Verizon cannot assert personal jurisdiction as a basis to dismiss the underlying actions because, if such flaw did exist, it "must be raised, and may be waived, by named defendants." *Id*., *citing* Fed. R. Civ. P. 12(b)(2) (lack of personal jurisdiction must be asserted in a responsive pleading) (Emphasis added.)

4. Plaintiffs need not establish personal jurisdiction in their Complaints.

Fourth, Plaintiffs "need not establish personal jurisdiction" when filing their complaints. *AF Holdings*, 2012 WL 3204917, at *15. Fed. R. Civ. P. 8(a)(1) requires a pleading to contain "a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support." For purposes of Rule 8, "'jurisdiction' refers to subject matter jurisdiction." *Id*., *citing* 2 Moore's Federal Practice, ¶ 8.03[1] (3d ed. 2007). There is no requirement "that a complaint allege a basis for personal jurisdiction over a defendant." *Id*., *collecting cases and citing* 4 Charles Alan Wright et al., Federal Practice and Procedure, § 1067.6 (3d ed. 2007) (collecting cases and noting that "strictly speaking, under Federal Rule 8(a) plaintiffs are not required to plead the basis for personal jurisdiction over defendants"). Plaintiffs "need only establish personal jurisdiction after it has been raised and contested by a defendant through a motion filed pursuant to Federal Rule of Civil Procedure 12(b)(2)." *Id*. (citation omitted). Here, and as set forth above, there are no named defendants as of yet and, consequently, "no person with standing to challenge personal jurisdiction before the Court." *Id*. Again, the inappropriateness of Verizon's objection on multiple grounds is made clear.

5. Consideration of personal jurisdiction is premature at this juncture.

Fifth, "it would be premature to consider the exercise of personal jurisdiction over unknown individuals when neither the Court nor the plaintiff is able to evaluate a specific individual's ties to the [district at issue]." *AF Holdings LLC v. Does 1-1,058*, 2012 WL 3204917, at *16 (D.D.C. Aug. 6, 2012). *See also West Coast Productions, Inc. v. Does 1-351*, 2012 WL 2577551, at *3 (S.D. Tex. July 3, 2012) ("Analysis of personal jurisdiction is premature when Plaintiff has not identified and named the [Doe] Defendants against whom

claims in fact will be asserted. The current record is plainly inadequate on the personal jurisdiction issue.").

The analysis in the recent decision in *AF Holdings* is instructive here. The court in AF Holdings faced virtually identical factual circumstances, i.e., the plaintiff sought limited discovery through subpoenas to ISPs to obtain information identifying unknown John Doe Defendants infringing the plaintiff's copyrights "in order to consider whether to name and serve them as defendants." *Id*. The ISPs receiving the subpoenas moved to quash the subpoenas on the basis that the court lacked "personal jurisdiction over the individuals associated with the IP addresses listed in the Complaint." *Id*. Noting the inability of either the court or plaintiff to make any jurisdictional determinations at that juncture of the case, the court held:

> The plaintiff certainly cannot anticipate and rebut personal jurisdiction arguments without more information, starting with the names and addresses of the ISPs' customers. Those customers, when and if named as defendants, may assert a personal jurisdiction defense, and the plaintiff may be able to counter such defense to establish personal jurisdiction with evidence not yet developed. For this reason, courts have regularly permitted a discovery period within which a plaintiff may gather evidence to support jurisdiction in cases where a party's contacts with the jurisdiction are unclear and the record before the court is "plainly inadequate."

Id. (citations omitted).

The situation is no different here. Neither the Court nor Plaintiffs can "anticipate and rebut personal jurisdiction arguments" without the identifying information for the Doe Defendants requested in the subpoenas. *Id*. These Doe Defendants, in turn, may assert personal jurisdiction defenses if and when they are served with lawsuits. In sum, the factual record before this Court at the present time is "plainly inadequate" to evaluate the issue of personal

jurisdiction, and the subpoenas at issue are the very tool that will provide the necessary jurisdictional facts for the Court and parties to evaluate. *Id*.

Accordingly, failing conclusively as it does on multiple grounds, Verizon's objection based on personal jurisdiction should be overruled.

D. The Subpoenaed Information is Not Only Relevant, but Crucial to Plaintiffs' Cases, and is Not Unduly Burdensome for Verizon to Produce

Verizon's fourth objection is that the information sought by the subpoenas is purportedly "neither relevant nor reasonably calculated to lead to the discovery of relevant information," and imposes an "undue burden" on Verizon. Objections, ¶ 4. Verizon's objection on these bases is wholly without merit.

1. The subpoenaed information is crucial to Plaintiffs' cases.

How Verizon can object to Plaintiffs' subpoenas on the basis that the information sought is "not relevant" is beyond belief. Obviously, the identifying information sought for the Doe Defendants, e.g., name, address, telephone number and e-mail address, is not only relevant, but crucial to Plaintiffs' case. As Verizon is aware, "[a]scertaining the identities of the defendants is critical to [Plaintiffs'] ability to pursue the litigation, for without the information [Plaintiffs] would be unable to serve process" and proceed with their cases. *UMG Recordings, Inc. v. Does 1-4*, 2006 WL 1343597, at *8 (N.D. Cal. 2006). The Courts in the underlying cases have agreed with Plaintiffs on this point, and have unanimously granted Plaintiffs' motions for leave to serve the subject subpoenas prior a Rule 26(f) conference. *See* Composite Exhibit B.

Verizon's objection based on the relevancy of the requested information is thus baseless. *UMG Recordings*, 2006 WL 1343597, at *8. *See also McMann v. Doe*, 460 F.Supp.2d 259, 265 (D. Mass. 2006) (holding in case involving proposed subpoena to identify Doe defendant that "[i]n this case, the discovery is essential. Without the ability to issue a subpoena, John Doe's

true name would remain unknown, this suit could not proceed, and Plaintiff…could receive no remedy.") (Emphasis added.)

2. Production of the subpoenaed information does not impose an undue burden on Verizon.

a. <u>Production is not burdensome to Verizon</u>.

Verizon's objection that Plaintiffs' subpoena "imposes an undue burden" upon it is entirely conclusory and without merit. Beyond asserting this "bare bones" objection, Verizon fails to provide any detail as to "Verizon's cost of complying with the Plaintiffs' subpoenas, the time associated with producing the requested information, or the procedure by which the information is obtained and released." *AF Holdings LLC v. Does 1-1,058*, 2012 WL 3204917, at *9 (D.D.C., August 6, 2012). The Court should note here that Verizon attempted to use this same baseless objection in the cited *AF Holdings* case—there providing a declaration containing no evidence of an undue burden—and the court rejected it as a basis to quash the subpoena at issue. *Id*., at *8-10. The court in *AF Holdings* instead found that the objecting ISP's, including Verizon's, declarations "[made] clear that the administrative burden incurred by the ISPs in responding to the Plaintiffs' subpoenas is minimal." *Id*. at *10.

The "burden" imposed upon Verizon in responding to Plaintiffs' subpoenas is here likewise minimal. Upon information and belief, Verizon's compliance entails directly uploading the IP addresses provided to it on an Excel spreadsheet by Plaintiffs into their computers, which will then automatically provide a list of the requested identifying information found on Verizon's customer database. Additionally, Plaintiffs compensate Verizon at a rate of $40.00 per IP address. Verizon's objection is thus akin to the ISP claiming it cannot identify its own customers easily and in a timely fashion if called upon and paid to do so. This is absurd.

b. Any claim of "burden" is disingenuous given that the subpoenas are Plaintiffs' only means to identify copyright infringers.

Moreover, any claim of an "undue burden" by Verizon is disingenuous given that Verizon enjoys limited liability despite its facilitation of infringing activities under the current state of the law. A brief discussion on the compromise struck during the enactment of the Digital Millennium Copyright Act ("DMCA") in 1998, and the way ISPs have disproportionately benefited from such compromise, is appropriate here. The DMCA originally reflected a carefully balanced compromise "between those who believed that ISPs should be exposed to potential liability for infringement occurring through use of their services, and those who believed such liability would stifle the growth of the Internet." *AF Holdings LLC v. Does 1-1,058*, 2012 WL 3204917, at *5. The DMCA resolved this legal and policy dispute by "limiting the liability of ISPs for infringing activity occurring over their networks," while providing "mechanisms for copyright owners to protect their copyrighted works with assistance from ISPs when specific evidence of infringing activity was identified." *Id*. (citation omitted).

One of the most useful tools for copyright owners to protect their works under the DMCA was a subpoena provision directed at ISPs in section 512(h) of the Act. *Id*. at *6. Using this provision, copyright owners who had a good-faith belief that an ISP's customer was using its services to engage in copyright infringement could obtain a subpoena from the clerk of any district court for such customer's identifying information in straightforward fashion. *Id*. However, the 512(h) subpoena provision was later challenged by, among other ISPs, Verizon. *Id*. The challenges resulted in a distinction being drawn between ISPs that "stored" information, and those that merely acted as a "conduit for data transferred between two internet users." *Id*. (citations omitted).

According to game-changing decisions by the D.C. and Eighth Circuits, "copyright holders attempting to identify persons infringing their copyrights using peer-to-peer file sharing programs—such as BitTorrent in the instant case—could not utilize the [512(h)] subpoena provision created in the DMCA to obtain identifying information from ISPs" that served as mere conduits for data transfers—including Verizon and most other ISPs offering standard internet services. *Id., citing Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *and In re Charter Communications, Inc., Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2005).

The decision in In re Charter, however, drew a lengthy and well-reasoned dissent from Judge Diana Murphy, who noted that disallowing the use of 512(h) subpoenas against ISPs such as Verizon effectively unraveled the compromise struck under the DMCA. *Id*. Noting that the legislative history behind the DMCA showed that its purpose "was to obtain the assistance of ISPs in an expeditious process to stop infringement," Judge Murphy opined:

> The majority's interpretation of the statute…denies copyright holders the ability to obtain identification of those subscribers who purloin protected materials through…conduit ISPs. This interpretation also shields conduit ISPs from liability without requiring their assistance in protecting copyrights. The suggestion that copyright holders should be left to file John Doe lawsuits to protect themselves from infringement by subscribers of conduit ISPs like Charter [and, in this case, Verizon], instead of availing themselves of the mechanism Congress provided in the DMCA, is impractical and contrary to legislative intent. John Doe actions are costly and time consuming. Nowhere in the DMCA did Congress indicate that copyright holders should be relegated to such cumbersome and expensive measures against conduit ISPs.

In re Charter, 393 F.3d 771, 782 (Murphy, J., dissenting), *citing* Sen. Rep. 105–190, at 51 (1998) ("The issuing of the [512(h) subpoena] should be a ministerial function performed quickly for this provision to have its intended effect.") (Emphasis added.)

Following Verizon and In re Charter, as Judge Murphy noted, the only mechanism for copyright owners, such as Plaintiffs, to obtain identifying information in peer-to-peer infringement cases is to file a "John Doe" suit like the one at bar. *AF Holdings*, 2012 WL 3204917, at *7. Verizon, however, clearly aware of how decisions such as Verizon and In re Charter now limit its obligations to assist in protecting copyrights, only seeks to further chip away at the DMCA through the instant Objections.

As other courts have noted, however, Plaintiffs "cannot salvage the value of [their] copyright without assistance from the ISPs because there is no way for the [Plaintiffs] to identify the unknown individuals referenced in the [underlying complaints] without responses to the subpoenas by [Verizon]." *AF Holdings*, 2012 WL 3204917, at *7. Accordingly now, "fourteen years after the DMCA effectively limited the ISPs' liability for copyright infringement in exchange for their cooperation in identifying persons involved in infringing activity through the use of their services," any attempt by Verizon to continue to object to providing such information by arguing an "undue burden" is audacious. *Id*.

Indeed, recent studies indicate that over several years, use of BitTorrent, "arguably the most widely distributed peer-to-peer system," has increased significantly, driven by such factors as a 25% increase in per-peer hourly download volume…[.]" *See* Otto, John S., et al., *On Blind Mice and the Elephant: Understanding the Network Impact of a Large Distributed System*, Proc. of ACM SIGCOMM, 2011, at Abstract and § 1, attached hereto as Exhibit "E." Data further indicates that most "BitTorrent traffic flows over cost-free paths and that it generates substantial revenue potential for many higher tier ISPs," such as Verizon. *Id*. at § 7. Specifically, this research points out that BitTorrent traffic has a fundamentally different impact on higher-tier ISPs—such as Verizon—than it does on those in lower tiers. *See generally id., and* § 6.2.

Generally, higher-tier ISPs generate revenue from lower-tier ISPs who are charged for the downloading habits of their users. *Id.* Accordingly, the more bandwidth that is used for infringing BitTorrent traffic, the more these higher-tier ISPs will profit from such activity. Meanwhile, lower-tier ISPs and, in turn, consumers pay increasing monthly costs as a result of the increased infringing traffic.

Thus, Verizon's current Objections can only be seen as being asserted in bad faith, and with the expectation to continue to profit from BitTorrent infringement at the expense of other, lower-tier ISPs and the consuming public at large. There is seemingly no incentive for ISPs such as Verizon to aggressively identify infringers on their network. Add to this the fact that Verizon and its cohorts enjoy virtual immunity from liability under the development of laws such as the DMCA, and this scenario presents multiple concerns of fairness and accountability. This should not stand in this or any other case, especially given the mass scale of online infringement. Any objection based on an "undue burden" to Verizon should therefore be dismissed out of hand by this Court.

E. <u>The Identifying Information Sought Will be Used for a Proper Purpose</u>

Verizon's fifth objection is that Plaintiffs have allegedly made an "insufficient showing" that the subpoenaed information "would be used for a proper purpose" in the underlying cases. Objections, ¶ 5. However, Verizon fails to present any evidence or argument that the subpoenas fall within any of the categories of "improper purposes" under Fed. R. Civ. P. 26(g), "such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 26(g)(1)(B)(ii).

To the contrary, and as argued above, the "purpose" of the discovery is entirely proper: to obtain information identifying unknown Doe Defendants infringing Plaintiffs' copyrights "in

order to consider whether to name and serve them as defendants." *AF Holdings*, 2012 WL 3204917, at *16. Verizon's objection on the ground of an improper purpose is thus baseless and should be overruled.

F. Plaintiffs' Right to Bring Suit for Copyright Infringement Outweighs Any Privacy and/or First Amendment Rights of Alleged Infringers.

Verizon's sixth objection argues without support that the subpoenas seek "information that is protected from disclosure by third parties' rights of privacy and protections guaranteed by the First Amendment." Objections, ¶ 6. Verizon's objection fails in light of Plaintiffs' countervailing rights.

Courts unanimously hold that Plaintiffs' First Amendment right under the Petition clause to bring a suit for copyright infringement outweighs any First Amendment right proffered by an alleged infringer. *See, e.g., West Coast Productions, Inc. v. Does 1-351*, 2012 WL 2577551, at *4 (S.D. Tex. July 3, 2012) (rejecting First Amendment and privacy arguments attempting to quash subpoenas to ISPs); *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F.Supp.2d 556 (S.D.N.Y. 2004), *and cases citing thereto*.

In this case, Plaintiffs have pleaded and provided evidence each of the Doe Defendants' IP addresses participated in a BitTorrent "swarm" that unlawfully reproduced and distributed Plaintiffs' copyrighted work. *See, e.g.*, Complaints, Section E and Exhibit "A." Plaintiffs, therefore, "[are] entitled to seek to assert [their] legal claims against persons shown to have willingly become a part of the BitTorrent swarm" infringing their works. *West Coast Productions*, 2012 WL 2577551, at *4. And, to the extent Verizon raises privacy or First Amendment concerns, the First Amendment affords "no protection" to "mask copyright infringement or to facilitate such infringement by others," as is the case here. *Id., and cases cited therein*.

Verizon's objection based on any purported privacy or First Amendment rights of the Doe Defendants should thus be overruled.

G. Plaintiffs' Subpoenas Do Not Exceed Applicable Rules

Verizon's final objection argues with no detail that the subpoenas seek to impose on Verizon obligations "different from, or greater than," those required by the Federal Rules of Civil Procedure or the Local Rules. Objections, ¶ 7. Verizon's boilerplate objection is clearly inapplicable to this case. The subpoenas do not exceed any applicable rules. Instead, and as established above, the subpoenas seek information over which Verizon has exclusive custody and control, and which is crucial to the establishment of Plaintiffs' cases for copyright infringement. Verizon's objection thus has no merit and should be overruled.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court overrule Verizon's Objections, order immediate compliance with the subpoenas and hold Verizon in contempt for failing to comply with same.

V. CERTIFICATE OF CONFERENCE

Plaintiffs, by and through undersigned counsel, and pursuant to Local Rule 7.1, hereby certify that on August 14, 2012, a telephonic conference was held between counsel for Plaintiffs and counsel for Verizon, Giancarlo Urey, Esq., in a good faith effort to resolve the issues raised by this Motion. Counsel for Verizon communicated during this conference that Verizon is not in agreement with the relief sought herein and will not withdraw any of the Objections at issue. As such, this Motion is opposed.

WHEREFORE, Plaintiffs respectfully request entry of an Order:

(A) Overruling each of Verizon's Objections;

(B) Compelling that Verizon comply forthwith with Plaintiffs' subpoenas and produce the requested information pursuant to Fed. R. Civ. P. 45(c)(2)(B)(i);

(C) Holding Verizon in contempt for failing to obey Plaintiffs' subpoenas pursuant to Fed. R. Civ. P. 45(e); and

(D) For such other and further relief as the Court deems just and proper.

DATED: November 19, 2012

Respectfully submitted,

Ni Law Firm, PLLC

By: /s/ Hao Ni
Hao Ni, Esq.
8140 Walnut Hill Lane, Suite 310
Dallas Texas 75231
Telephone No.: (972) 331-4602
Facsimile No.: (972) 314-0900
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via electronic correspondence and U.S. Mail to: Giancarlo Urey, Esq. [GUrey@mofo.com], Morrison & Foerster, LLP, 555 West Fifth Street, Los Angeles, California 90013-1024, on this 19th day of November, 2012.

By: /s/ Hao Ni
Hao Ni, Esq.